IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMARY SUIT NO.519 OF 1978

W I T H

SUMMARY SUIT NO.878 OF 1978

Gujarat Saving Unit Pvt.Ltd. .. .. Plaintiffs

V/s.

1. Doburg Lager Breweries (P) Ltd. & others. .. .. Defendants

Mr.Pankaj Kouli i/by M/s.Shantilal & Co. for Plaintiffs.

Ms.Mery Aguiar i/by M/s.Khaitan & Jayakar for Defendant No.7.

Ms.A.S. Kaushik for Defendant No.3(c).

CORAM : SMT.R.S. DALVI, J.

Dated : 2nd April 2007

JUDGMENT :

1. Both these Suits are filed by the same Plaintiffs upon the promissory notes executed by Defendant No.1 as the principal debtor through Defendant Nos.2 and 3 who are

the Directors of Defendant No.1 and Defendant No.4 which is the separate limited Company. The amounts payable to the Plaintiffs under the promissory notes have been separately guaranteed under separate letter of guarantee by Defendant No.6 as the partner of Defendant No.5. In Suit No.878 of 1978 there are separate letters of guarantee executed also by Defendant Nos.7, 8 and 9. Defendant No.3, who was the drawer of the promissory note, being a Director of Defendant No.1, has expired leaving behind as his heirs Defendant Nos.3(a), 3(b) and 3 (c). Defendant Nos.3(a) and 3(b) are also stated to have expired and Defendant No.3(c), who survives them, is liable only to the extent of the estate of the deceased father, which has come to her hands.

2. It is the case that Defendant No.3 that her deceased father, left no estate and hence, she is not liable. The Plaintiffs have accepted the legal position relating to her liability as also the factual position relating to the fact that she has not received any estate of Defendant No.3.

3. Defendant Nos.5 and 6 and Defendant Nos.7, 8 and 9 are guarantors in Suit No.878 of 1978 and accordingly, their liability is co-extensive with that of the principal debtor. The liability of the principal debtor is also under the promissory note where the consideration that passed thereunder is presumed.

4. Defendant No.1-Company has been taken over by M/s.Shaw Wallace & Company Limited, which is Defendant No.7 in Suit No.519 of 1978. Their subsidiary concern is Defendant No.8 in the said Suit. Since they have taken over the assets and liabilities, they are liable to make payment to the Plaintiffs of the amounts that are found payable by Defendant No.1 under the promissory notes.

5. A decree against Defendant Nos.1, 2 and 4 has been passed in Suit No.878 of 1978 and hence, in that Suit, M/s.Shaw Wallace & Co. Ltd. as well as its subsidiary concern have not been brought on record as Defendants.

Since no ex-parte decree is passed against the principal debtors in Suit No.519 of 1978, the Company which has taken over their assets and liabilities, are necessarily sued as principal debtors.

6. The Suit having been filed on the promissory notes, the consideration having passed thereunder has been accepted and the guarantors having issued letters of guarantee, the Plaintiffs' claim against the principal debtors being Defendant Nos.1 to 4 in Suit No.878 of 1978 and the Company which has taken over their assets and liabilities being Defendant Nos.7 and 8 in Suit No.519 of 1978 is within such narrow limit.

7. No Written Statement is shown to be filed by any of the Defendants in Suit No.519 of 1978. Defendant Nos.5 and 6 as well as Defendant Nos.7, 8 and 9 in Suit No.878 of 1978 have filed their separate Written Statements. The main contention in their Written Statement is that they have executed letters of guarantee in blank and hence,

they have no liability thereunder.

8. No issues are, therefore, framed in Suit No.519 of 1978. The Suit will have to be decreed under the provisions of Order VIII Rule 10 of the Code of Civil Procedure, 1908. Issues are framed in Suit No.878 of 1978 on 3.8.1998 by Justice Datar (as he then was).

9. No evidence is also led in Suit No.519 of 1978 since no Written Statement is filed. An Affidavit of examination-in-chief of the Plaintiffs has been filed in Suit No.878 of 1978. Since ex parte decree was passed earlier against Defendant Nos.1, 2 and 4 in Suit No.878 of 1978, a xerox copy of the initial documents being the promissory notes and the guarantee letters of Defendant Nos.2 and 3 are filed. Since the Suit was to proceed against the guarantors in lieu of their separate Written Statements, the original guarantee letters have been annexed to the Affidavit of examination-in-chief of the Plaintiffs in Suit No.878 of 1978.

10. The Plaintiffs' witness P.W.1, in the Affidavit of examination-in-chief, has proved the execution of the promissory notes, the letters of guarantee of Defendant Nos.2 and 3, the letters of guarantee of Defendant No.6 i.e. on behalf of Defendant No.5 as its partner and the letters of guarantee of Defendant Nos.7, 8 and 9. Consequently, these documents are marked as Exhibits A, B and C on record.

11. The cross-examination has proceeded before the Commissioner appointed by the Court. The questions in the cross-examination relate to the execution of the guarantees by Defendant Nos.5 and 6 as well as Defendant Nos.7 to 9. There is not a single question in the execution with regard to execution of the guarantees in blank.

12. The promissory notes in Suit No.519 of 1978 are to the extent of Rs.2.5 Lacs and Rs.1.4 Lacs. They carry interest

at the rate of 15% per annum as mentioned in the promissory notes themselves. The promissory note of Rs.4 Lacs is executed in Suit No.878 of 1978. It carries an interest at the rate of 21% per annum thereon as stated in the promissory note itself.

13. The letters of guarantee are to the extent of Rs.15 Lacs. This shows, the guarantee given by Defendant Nos.2 and 3 on behalf of Defendant No.1 as well as Defendant No.6 as a partner of Defendant No.5, that the Plaintiffs may advance loans upto Rs.15 Lacs to the borrower – Defendant No.1, for which they would be jointly and severally liable. Consequently, the extent of the guarantee is for Rs.15 Lacs. Rs.15 Lacs are admittedly not advanced. These guarantees are common in both the Suits since they are given by Defendant Nos.2 and 3 on behalf of Defendant No.1 as well as by Defendant No.6 as a partner of Defendant No.5 guaranteeing repayment of loan to Defendant No.1 of the amounts to the extent of Rs.15 Lacs.

14. By a separate similar letter of guarantee of Rs.10 Lacs, Defendant Nos.7, 8 and 9 in Suit No.878 of 1978 also guaranteed advancing loan to the extent of Rs.10 Lacs by the Plaintiffs to Defendant No.1.

15. The total amount of Rs.9.4 Lacs with contractual rate of interest thereon is, therefore, the liability of Defendant No.1 as the principal debtor. For the repayment of such loan of Rs.9.4 Lacs, which forms the Plaintiffs' action in both the above Suits, the guarantees are given to the extent of Rs.15 Lacs and Rs.10 Lacs.

16. I am told that under a separate Agreement, Defendant No.6, as a partner of Defendant No.5, has discharged a part of liability and the Plaintiffs have agreed not to prosecute their claim against Defendant Nos.5 and 6 any further. The Affidavit of examination-in-chief of the Plaintiffs shows certain part payments made.

17. It may be mentioned that the Advocate for the Plaintiffs stated to Court that the total amount payable in both these Suits under the aforesaid four promissory notes, including the contractual rate of interest payable thereon is Rs.13.21 Lacs. The Plaintiffs have received in all Rs.6.43 Lacs. The Plaintiffs, therefore, claim a balance of Rs.6.78 Lacs. (This is a part of Exhibit-6 – document sought to be tendered in the cross-examination of the Plaintiffs' witness P.W.1).

18. Based upon the pleadings of the parties, the following issues have been raised in Suit No.878 of 1978, which are answered as follows:-

(i) Issue No.1 – Yes.

(ii) Issue No.2 – No.

(iii) Issue No.3 – As per judgment.

(iv) Issue No.4 – Yes, subject to the part payments made.

(v) Issue No.5 - As per final order.

19. Since the guarantees relate to the loan advanced in

both the Suits, the defence of the Defendants in Suit No.878 of 1978 shall, in the interest of justice, be considered in Suit No.519 of 1978 also.

20. **Issue No.1** - The execution of the promissory note is not being denied in both the Suits. A decree has been passed against the principal debtor in Suit No.878 of 1978 and has been partly executed also. The consideration that passed under the promissory note is presumed in law. Nothing further need be proved by the Plaintiffs. Hence, Issue No.1 is answered in the affirmative.

21. **Issue No.2** - Defendant Nos.5, 6, 7 and 8 claim that they have signed blank letters of guarantee and those guarantee letters are fabricated. They have not led any evidence of any witness to show how, when and under what circumstances the guarantee letters came to be executed by them in blank. They have not even put such a case to the Plaintiffs' witness in Suit No.878 of 1978. The only question with regard to the execution of the

guarantee and the liability of Defendant No.1, which is put to the Plaintiffs' witness, is with regard to the calculation of the guarantee of Rs.15 Lacs when the original loan is only Rs.4 Lacs in Suit No.878 of 1978. (In fact, it is only Rs.6.4 Lacs in Suit No.519 of 1978 also). P.W.1 has replied that the guarantees cover the advances made in both the Suits which included Rs.6.4 Lacs in Suit No.519 of 1978 also. He was asked how the figure of Rs.15 Lacs was arrived at as the amount under the letter of guarantee. P.W.1 has replied that, that was a formality and that if Defendant No.1 does not pay the amount which may reach near this amount, the guarantee would apply. Indeed, the amount with interest payable by Defendant No.1 as the principal debtor has reached more than Rs.15 Lacs, part of which is repaid. Aside from the cross-examination on the arithmetical calculation of the amount of the guarantee, no other case is made out in the cross-examination. Certain other documents have been sought to be tendered in the cross-examination of P.W.1 relating to the cross-examination of the decree against

Defendant Nos.1, 2 and 4 in Suit No.878 of 1978, the present liability and the factum of the Company having been taken over together with its assets and liabilities by M/s.Shaw Wallace & Co. Ltd. None of these documents relates to the issue of fabrication of the letters of guarantee. The guarantors are businessmen and the relatives of the principal debtors. There is no case made out by them that they have been made to sign under coercion. They were free not to give the guarantee. They have given the guarantees knowing of the debts incurred by Defendant No.1 as the principal debtor. In fact, the Plaintiffs have fairly neither claimed the full extent of the guarantee nor claimed from the Defendants an amount more than what is due under the promissory notes with agreed interest thereon. In the circumstances, Defendant Nos.5, 6, 7, 8 and 9, who had the onus to prove that the guarantee letters are fabricated, have not discharged their onus after admitting the execution of the guarantee letters. Issue No.2 is, therefore, answered in the negative.

22. **Issue No.3** - The liability of Defendant Nos.5 and 6, as the guarantors of Defendant No.1, is in both the Suits to the extent of the claim in Suit. Defendant No.6, partner of Defendant No.5, has the liability co-extensive with that of the principal debtor.

23. Defendant Nos.7, 8 and 9 have given the guarantee only in Suit No.878 of 1978. They would be liable only to the extent of the claim in the promissory note in Suit No.878 of 1978. The promissory note in that Suit is for Rs.4 Lacs with interest at the rate of 21% per annum thereon. Their co-extensive liability is to the extent of that amount. Issue No.3 is answered accordingly.

24. **Issue No.4** - The Plaintiffs are entitled to recover Rs.6,51,553.33 being the amount of promissory note as also the agreed rate of interest of 21% per annum thereon from the date of the execution of the promissory note until the filing of the Suit. There is a typographical error in the amount shown in Issue No.4. Rs.4,51,000/- in the said

Issue must be read as Rs.6,51,533.33 instead. The Plaintiffs would be entitled to that sum. Issue No.4 is answered accordingly. The Plaintiffs are also entitled to recover the principal amount with interest thereon as claimed by them in Suit No.519 of 1978.

25. **Issue No.5** - Suit No.519 of 1978 as well as Suit No.878 of 1978 are decreed as prayed. The Plaintiffs shall give credit to the Defendants for the amount of part payments made after filing of the Suit as shown in Exhibit-6 in evidence and any further amounts received thereafter from Defendant Nos.5 & 6. The Plaintiffs' Advocate's statement that the Plaintiffs shall not claim amounts from Defendant No.3(c) is accepted.

26. Both the Suits are disposed of accordingly.

(SMT.R.S. DALVI, J.)